COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1884

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

CRAIG I. HALVERSON,

PETITIONER-RESPONDENT,

V.

JUNE E. HALVERSON,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 VERGERONT, J. June Halverson appeals the denial of maintenance and the property division in the judgment of divorce from Craig Halverson. She contends the trial court erroneously exercised its discretion in

denying her maintenance because that decision was based on erroneous findings of fact regarding her earning capacity. She also contends the trial court erroneously exercised its discretion in deviating from the presumed 50/50 division of property with respect to Craig's retirement account. We conclude the trial court properly exercised its discretion both in denying maintenance and in dividing the retirement account, and we therefore affirm.

BACKGROUND

¶2 Craig and June were married on July 25, 1992, and the judgment of divorce was entered on March 10, 2000. At the time of the filing of the divorce action, the parties had lived together five and one-half years. Craig was forty-nine at the time of divorce and June was forty-two. This was Craig's first marriage. June had been married previously and had two children from her first marriage. Craig and June had one child during their marriage, born in 1994, and the parties stipulated that her primary placement was to be with June.

¶3 At the time of the divorce, Craig was employed as a teacher and earning $37,853 per year. He had been employed in this capacity for approximately twenty years, although during one year of the marriage he did not work but received disability benefits because of brain surgery.

¶4 June earned a bachelor's of science degree in nursing and a "diploma R.N." in 1986. The court found that in 1990 she earned $27,000 as an R.N. In April 1992, shortly before her marriage to Craig, she was fired from Lutheran Hospital in La Crosse. At the time she and Craig married, she was working part time for the Visiting Nurses Association. During the marriage she began working part time for Vernon Memorial Hospital, but she was fired from that job in February 1994. She sued the hospital for wrongful termination and in February

1996 received a verdict in the amount of $100,000 for lost wages. After the termination from Vernon Hospital, she worked part time at other nursing jobs, and, excluding the verdict from the lawsuit, her annual income averaged $9,285 between 1992 and 1999. At the time of the divorce, she was not working and was a student in a master's program of science in nursing with a focus on nursing education, expecting to graduate in May 2001.

¶5 June asked the court to award her $700 per month in maintenance and 50% of all the property including Craig's account with the Wisconsin Retirement System (WRS) and the Metropolitan Life IRA, or, in lieu of maintenance, to award her more than 50% of the marital estate.[1]

¶6 The trial court denied June's request for maintenance. It found that each party's educational level was the same at the time of the marriage as it was at the final hearing and neither party had contributed to the educational level of the other, the marriage was relatively short, and both parties were relatively young and in good health.[2]

¶7 The court found June's earning capacity to be in excess of $37,000 to $38,000 per year, explaining that it based this finding on evidence of the numerous opportunities in her field, the jobs that were available, and the advertised wage of over $18 per hour. The court also explained that it did not accept her testimony that her opportunities were restricted and she therefore had to

[1] Child support, which the court ordered Craig to pay at 17% of his gross income, was not a contested issue.

[2] The court observed that it was not finding Craig's health to be a factor because, although there was evidence that he had had serious health problems, there was no evidence that was a major issue at the time of the divorce.

obtain more education; rather, it found that she could get a job at her earning capacity if she tried. The court further found that June's earning capacity was not significantly different from Craig's, which, the court found, was about $39,000 per year.

¶8 With respect to Craig's WRS account, the court decided to deviate from a 50/50 division of this asset. The court found that the majority of the value of this asset was attributable to efforts Craig made prior to the marriage—six and one-half years during the marriage compared to a total of twenty years—and determined that this fact in itself was a basis for deviating from the 50/50 presumption. The court determined that another basis for deviating from the 50/50 presumption was its finding that June had deliberately hidden, destroyed or sold certain items that had monetary value and also emotional value for Craig. The court ordered that Craig's WRS account be subject to a Qualified Domestic Relations Order (QDRO) that divided the account based on the percentage proposed by Craig: 16.24%. This percentage was arrived at by using a "coverture fraction," the numerator of which is the years during the marriage that contributions were made to Craig's account and the denominator of which is the total years of contribution, and then by dividing that fraction in half.[3]

¶9 The court divided the proceeds from the parties' residence 50/50. Regarding the rest of the parties' assets, the court adopted the division proposed by Craig. According to Craig's proposal, certain property he brought to the marriage, including the Metropolitan Life IRA, was not divided; the property that was divided was divided 50/50 (not including the WRS account); and Craig then

[3] The numerator used in this case is not the length of the marriage—7.5 years—but, rather, 6.5 years because Craig did not work for one year during the marriage.

agreed to forgo the $14,621.32 equalization payment that June would otherwise owe him.[4]

DISCUSSION

Maintenance

¶10 The decision whether to award maintenance is committed to the trial court's discretion. ***Hokin v. Hokin***, 231 Wis. 2d 184, 190 ¶9, 605 N.W.2d 219 (Ct. App. 1999). We affirm a trial court's discretionary decision if the court makes a rational, reasoned decision and applies the correct legal standard to the facts of record. ***Id.*** We accept all findings of fact made by the trial court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000).[5] Whether the trial court applied the correct legal standard is a question of law, which this court reviews de novo. ***Hokin***, 231 Wis. 2d at 191 ¶9.

¶11 In deciding whether to award maintenance, the court is to consider the factors in WIS. STAT. § 767.26,[6] which are designed to further two

[4] The court found certain financial accounts having a total value of $16,720.81 to have been gifted to Craig and therefore not subject to division because June had not shown that hardship to her required division of this asset. This determination is not relevant to this appeal.

[5] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[6] WISCONSIN STAT. § 767.26 provides as follows:

> **Maintenance payments**. Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:
>
> (1) The length of the marriage.
>
> (2) The age and physical and emotional health of the parties.

(continued)

objectives: support and fairness. ***Hokin***, 231 Wis. 2d at 200-01 ¶22. The former ensures the spouse is supported in accordance with the needs and earning capacities of the parties, and the latter ensures a fair and equitable arrangement between the parties in each individual case. ***Id.***

¶12 June contends the trial court's finding that she had an earning capacity in excess of $37,000 to $38,000 is erroneous because it was based on two "unsubstantiated and unsupported hearsay exhibits"—the printout from the Mayo Clinic website of jobs available in Rochester, Minnesota, where June was living at

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> (3) The division of property made under s. 767.255.
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> (4) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (7) The tax consequences to each party.
>
> (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (9) The contribution by one party to the education, training or increased earning power of the other.
>
> (10) Such other factors as the court may in each individual case determine to be relevant.

the time of the final hearing, and a printout from an internet site. June also contends there is no evidence that she qualifies for these jobs or would be offered them if she applied.

¶13 The two exhibits were submitted by Craig, and June did not object to their admission. Therefore, she waived objections to their admissibility and we will not consider her objections now. *See* ***Caccitolo v. State***, 69 Wis. 2d 102, 114, 230 N.W.2d 139 (1975). Since the exhibits were admitted, the court did not err in considering them as evidence of the availability of jobs in the area where June lived and of the pay offered for those jobs. Because the job titles were "Registered Nurse" and June had that degree plus years of experience working as a nurse, the court could reasonably find that she had the qualifications and experience for those jobs in the absence of any evidence to the contrary.

¶14 June did present evidence of her unsuccessful efforts to find jobs in Wisconsin and in Caledonia, Minnesota, after she was fired from Vernon Memorial Hospital—three rejections in April and May of 1998, six in May and June 1995, and one in December 1994. She also testified to other efforts to find a nursing job after that termination. However, she did not testify that she had applied for jobs recently or in Rochester, Minnesota. Craig testified that around the time of the lawsuit he knew June made ten or fifteen applications that were rejected, but in the past two years she had not tried at all. Although June testified that the difficulty in finding a job was one reason she decided to go to graduate school, she also testified that she had wanted to retrain for some time but had put it off because of Craig's health problems, and she testified that she wanted to get a job with day shifts rather than hospital nursing so that she was working when her daughter was in school. In addition, June gave reasons for not working full time during her marriage that were unrelated to her ability to obtain full-time work as a

registered nurse. While those reasons—such as her son's illness—were certainly legitimate, the point is that her part-time work during the marriage is not necessarily evidence of her earning capacity.

¶15 The evidence supports a finding that June could now obtain a job as a full-time registered nurse if she made an effort to do so. The court could also reasonably decide that, even though June's career prospects and ability to have convenient hours for her child care responsibilities might be enhanced by her further education, it was not appropriate, given the objectives of maintenance and the applicable statutory factors, for Craig to pay June maintenance so that she could go to graduate school rather than work at her present earning capacity. We conclude the trial court's finding on June's earning capacity was not clearly erroneous and that its decision to deny maintenance based on this record was not an erroneous exercise of discretion.

Property Division

¶16 The division of the marital estate, like maintenance, is committed to the trial court's discretion. ***Hokin***, 231 Wis. 2d at 190 ¶9. All property owned by the parties is part of the marital estate and subject to division, except for property acquired before or during the marriage by gift or inheritance, or funds acquired from either. *See* WIS. STAT. § 767.255(2)(a).[7] The court is to presume that the marital estate is to be divided equally, although it may alter the distribution after considering various factors. *See* § 767.255(3).[8]

[7] Property that is separate under WIS. STAT. § 767.255(2)(a) may be divided if the court finds that refusal to do so will create a hardship on the other party or the children. *See* § 767.255(2)(b).

[8] WISCONSIN STAT. § 767.255(3) provides as follows:

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(3) The court shall presume that all property not described in sub. (2) (a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

(a) The length of the marriage.

(b) The property brought to the marriage by each party.

(c) Whether one of the parties has substantial assets not subject to division by the court.

(d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(e) The age and physical and emotional health of the parties.

(f) The contribution by one party to the education, training or increased earning power of the other.

(g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

(h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.

(i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.

(j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

(k) The tax consequences to each party.

(L) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

(continued)

¶17 June challenges the property division as a "gross deviation" from the presumed 50/50 and she asks that we reverse and remand with a direction that the court divide Craig's retirement account 50/50. She first contends that, at a minimum, case law requires that she receive half of all the earnings on Craig's retirement account during the marriage, and she asserts that under this view of the law, she is entitled to 32.5%, not 16.24%. We do not agree that case law "requires" that she receive any particular amount. It is true that a spouse's entire interest in a pension—whether existing before the marriage or acquired during a marriage—is part of the marital estate subject to division in the divorce, and this includes the interest on a pension that accumulates during the marriage. ***Hokin***, 231 Wis. 2d at 193 ¶10. However, it is also true that the use of a coverture fraction may be an appropriate way to divide a pension, depending upon the facts of a particular case. ***Id.*** at 192-93 ¶10. The issue therefore is whether the court in this case properly exercised its discretion in using a coverture fraction to divide the pension. We conclude that it did.

¶18 The fact that property was brought to a marriage is a proper factor to consider in deviating from the presumed equal division of the marital estate, *see* WIS. STAT. § 767.255(3)(b), as is the length of the marriage. Section 767.255(3)(a). In this case, although the marriage was 7.5 years, which, in itself is a relatively short marriage, the parties were living separately for two years before that. The short term of the marriage is one factor that makes it reasonable for the court to "return" to the parties the property each brought to the marriage if the evidence establishes what that property is. Here the court had a sufficient evidentiary basis on which to find that the coverture fraction (6.5 divided by

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(m) Such other factors as the court may in each individual case determine to be relevant.

20.01, or 32.48%) was an accurate way to determine the portion of Craig's retirement account that accumulated during the marriage.

¶19 Craig's accountant testified that if the court were to award to June 16.24% of Craig's retirement account by means of a QDRO, that would be one-half of the growth in the account during the marriage. June appears to argue that the accountant agreed that this percentage did not take into consideration the interest earnings of the retirement account during the marriage, whereas her proposed percentage of 32.5% did. However, that is not how we read the accountant's testimony. He agreed, on cross-examination, that the increase in the account from the date of the marriage until January 1, 2000, was 65% of the account balance on January 1, 2000. (On the date of the marriage the fund balance was $54,179.56, and on January 1, 2000, the balance was $154,191.) However, he did not agree that using this percentage to determine the percentage for a QDRO (that is, one-half of 65% or 32.5%) was correct, because, he explained, it assumed the earnings on $54,179.56 were attributable to the marital period, or expressed differently, that the marriage-date balance "s[a]t idle for a seven-and-a-half-year period."[9]

¶20 June also appears to challenge one of the court's reasons for not dividing the premarital portion of the retirement account—that she had intentionally hidden, destroyed, or sold items that Craig had brought to the marriage and which had emotional value to him. She does not contend that

[9] Although Craig's accountant also testified to the present value of an annuity based on Craig's WRS retirement plan, he explained that the computation of present value does not matter when the retirement account is going to be divided with a QDRO: under a QDRO, a percentage is applied to the actual value of the participant's account as of the date of the judgment of divorce.

finding was clearly erroneous. She asserts the total value of this property was $2,286.00. (Although the court did not make a finding on the value of this property, $2,286 was the value shown on Craig's exhibits.) We understand June's argument to be that this amount did not justify the much greater amount by which Craig benefited from the uneven division of his retirement account.

¶21 We will assume without deciding that it would be an erroneous exercise of discretion if the court were to penalize June for hiding, destroying, or selling that property by awarding more than the value of that property as an offset to Craig.[10] However, we do not read the court's explanation for its division of Craig's retirement account as depending upon this rationale for the amount by which the court deviated from the 50/50 presumption in dividing the pension. The percentage the court used, it explained, was based on the proportion of the account attributable to the years of contribution during the marriage as compared to the total years of contribution. The much greater time period of contribution before the marriage, as compared to the period during the marriage, was, the court stated, "in and of itself" a basis for deviating. We conclude that this is a proper and sufficient basis for deviating by the amount the court did, based upon the record in this case.

¶22 June next argues that the court's disparate treatment of other property brought to the marriage requires a 50/50 division of Craig's retirement

[10] WISCONSIN STAT. § 767.087(1)(b) prohibits a party during the pendency of a divorce from "concealing, damaging, destroying, transferring or otherwise disposing of property owned by either or both of the parties, without the consent of the other party or an order of the court," except in limited circumstances not applicable here. Violations may be proceeded against as a contempt of court under WIS. STAT. ch. 785, which provides for various sanctions, including payment of a sum sufficient to compensate for the loss suffered by the other party as a result of the contempt. WIS. STAT. § 785.04(1)(a).

account. She asserts that it is uncontroverted that she contributed $8,100 from the sale of the home she owned before the marriage to the home she and Craig built, and the court did not return this to her before dividing in half the proceeds from the sale of their home. In contrast, June asserts, the court without explanation did not divide the $22,586.15 Metropolitan Life IRA which Craig brought to the marriage.

¶23 Craig responds that, although the court did not expressly state its reasoning for awarding the Metropolitan Life IRA to him, it is evident from the court's overall reasoning that, in view of the short term of the marriage, it aimed to return to each party the property each brought to the marriage to the extent it could determine what that property was. There was no dispute that the Metropolitan Life IRA in the amount of $22,586.15 was Craig's premarital property. In contrast, Craig continues, there was conflicting evidence about the amount each of the parties and their families contributed to the home. The court made these findings with respect to the house:

> The parties discussed a great deal about the sources of the down payment for the house. The Court finds that both families may well have given money to one or the other, or both of the parties. The Court cannot say that they were gifts only to one person and there has been a lack of proof as to whether there is some sort of gift subject to preferential treatment for one party or the other. The Court finds that regardless of the source, the monies went into the house that was owned in both parties' names. There was a co-mingling there and there was also a lawsuit regarding the home. The proceeds from the lawsuit also were involved in the co-mingling and then the proceeds from the insurance were also co-mingled. The Court cannot find that this belongs to one party or the other as a gift and the Court believes the proceeds should be divided equally.

Craig also points out that by accepting his proposed property division, the court was not requiring June to pay Craig the $14,621.32 necessary to equalize the values they each received from the marital estate (not counting Craig's premarital property or the retirement account).

¶24 June has not filed a reply brief, and, because her arguments on this point in her first brief were cursory, we are left unconvinced that the trial court erroneously exercised its discretion in the manner in which it treated the proceeds of the sale of the parties' home and the Metropolitan Life IRA. Moreover, June is not asking for a uniform treatment of the Metropolitan Life IRA, and of her contribution to the down payment on their home, but for a 50/50 division of Craig's retirement account because of the different ways in which the trial court treated these other two items. We generally look for reasons to sustain a trial court's exercise of discretion, rather than reasons to reverse it. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 155 Wis. 2d 365, 374, 455 N.W.2d 250 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 296, 470 N.W.2d 873 (1991). In addition, we may treat an appellant's failure to dispute propositions in a responsive brief as concessions. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). In the absence of a more developed argument from June, we conclude the trial court did not erroneously exercise its discretion in dividing the proceeds of the sale of the parties' home equally while not dividing the Metropolitan Life IRA. We further conclude that the manner in which the court divided these assets does not make its division of Craig's retirement account unreasonable or unfair.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.